UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NORMAN F. RICHARDSON,	***)***	
	)	
Plaintiff,	***)***	
	)	
v.	***)***	***Docket No. 98-266-P-C***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Supplemental Security Income ("SSI") and Social Security Disability ("SSD") appeal raises the questions whether the commissioner's decision is supported by substantial evidence, whether it properly rejected the opinion of the plaintiff's treating physician, whether the hypothetical question posed to the vocational expert was fatally deficient, whether the plaintiff's credibility was properly discounted, and whether the matter should be remanded for consideration of a subsequent decision of the Maine Workers' Compensation Board. I recommend that the court vacate the commissioner's decision and remand the case with directions to award benefits to the plaintiff.

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[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner had admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 18, 1998 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5. 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff met the disability insured status requirements of the Social Security Act on July 21, 1995, the date upon which he stated that he became unable to work, and that he continued to meet those requirements through the date of the decision, September 25, 1996, Finding 1, Record p. 24; that the plaintiff had not engaged in substantial gainful activity since July 21, 1995, Finding 2, Record p. 24; that the plaintiff suffered from mild spinal stenosis without encroachment on the spinal cord, degenerative disc disease, chronic back pain, mild depression, right wrist tendonitis without any objective findings, and a slight hearing loss, but that none of these impairments alone or in combination met or equaled the criteria of any of the impairments listed in Appendix I to Subpart P. 20 C.F.R. § 404, Finding 3, Record p. 24; that the plaintiff's testimony concerning the degree of incapacity he suffered was not supported by the record and was not found to be fully credible, Finding 4, Record p. 25; that the plaintiff had the residual functional capacity to perform the full range of light work with the following restrictions: avoiding stressful situations, limited interpersonal contacts, minimal responsibility in non-complex, non-technical, routine jobs with few day-to-day changes, requiring no more than minimal concentration, no use of vibratory machines, no repetitive bending or twisting, no climbing, no driving more than one hour at a time, no standing on uneven ground or concrete floors, lifting no more than 10 pounds frequently or 25 pounds occasionally, and requiring only occasional balancing, stooping, kneeling, crouching and crawling, Findings 5 & 7, Record p. 25; that the plaintiff was unable to perform his past relevant work as a construction laborer and truck driver, Finding 6, Record p. 25; that given the plaintiff's age (40), high school education, lack of transferable skills,

and exertional capacity, application of section 202.20 of Appendix 2, Table 2, to Subpart P, 20 C.F.R. § 404 ("the Grid"), along with 20 C.F.R. §§ 404.1569 and 416.969, directed a conclusion that the plaintiff was not disabled, Findings 8-11, Record p. 25; that, although the plaintiff's additional nonexertional limitations did not allow him to perform the full range of light work, when the Grid was used as a framework for decisionmaking, there were a significant number of jobs in the national economy which he could perform, specifically the job of flagger, of which there are 100 in the state, Finding 12, Record pp. 25-26; and that the plaintiff was therefore not under a disability as defined in the Social Security Act, Finding 13, Record p. 26. The Appeals Council declined to review the decision, Record pp. 6-7, making it the final decision of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs*., 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Sevretary of Health & Human Servs.*, 76 F.3d 15. 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs*., 647 F.2d 218, 222 (1st Cir. 1981).

Discussion

The plaintiff's challenges to the commissioner's decision arise at Step 5 of the evaluation process, where the burden if on the commissioner to show that there is work available in the national economy that the plaintiff is capable of performing. *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). After concluding that the plaintiff could perform less than the full range of light work, the

administrative law judge relied on the testimony of a vocational expert to find that the plaintiff could perform the job of flagger at a construction site,[2] of which there are 100 in Maine and 100,000 in the regional economy. Record p. 72. The plaintiff argues that this finding is erroneous because such a job is inconsistent with the "unrebutted" evidence that he cannot stand for more than 20 to 30 minutes and his treating physician's restriction that he not undertake work involving high responsibility. Plaintiff's Itemized Statement of Specific Errors ("Itemized Statement") (Docket No. 3) at 1. The vocational expert testified in response to questions from the plaintiff's attorney that his opinion regarding the flagger position as appropriate for the plaintiff would change if a restriction of no standing for more than an hour without a break or no high responsibility were imposed. Record pp. 74-75.

The administrative law judge's decision mentions the restriction imposed by Dr. Pamela J. Wansker, the plaintiff's treating physician, that the plaintiff not engage in situations requiring high responsibility. *Id.* p. 19. However, the decision does not mention the time limits placed on the plaintiff's standing by Dr. Wansker at the same time she imposed the responsibility restriction, *id.* p. 365, as well as earlier, *id.* pp. 249-50, 254, and later, *id.* p. 484. The standing restriction is not included in the hypothetical question posed to the vocational expert by the administrative law judge, but the question does include the limitation of "[n]o jobs with more than a minimal amount of responsibilities." *Id.* pp. 70-71. The plaintiff argues that the administrative law judge was required by 20 C.F.R. § 404.1527(d)(2) to give controlling weight to Dr. Wansker's restrictions on these

[2] The administrative law judge cites the job of flagger in her decision as "[a]n example" of light work jobs that the plaintiff could perform. Record p. 26. The vocational expert, however, testified that this job was the only one he could find that was available, given the plaintiff's limitations as set forth by the administrative law judge. *Id.* p. 72.

points and that she also failed to state her reasons for rejecting this medical evidence as required by 20 C.F.R. § 404.1527 and Social Security Ruling 96-2p. Itemized Statement at 3-4. An administrative law judge may not reject a treating physician's conclusions unless he explains on the record the reasons for doing so. *Allen v. Bowen*, 881 F.2d 37, 41 (3d Cir. 1989).

At oral argument, the commissioner did not dispute the plaintiff's claim that Dr. Wansker's opinions are entitled to controlling weight. He argued instead that the administrative law judge's hypothetical question to the vocational expert and her conclusions set forth in her decision are not inconsistent with Dr. Wansker's opinion regarding the plaintiff's standing limitations because, with one exception, Dr. Wansker expressed that limitation in terms of a period of time "without stretch." *E.g.*, Record pp. 249-50, 254, 365, 384. The exception is a letter written by Dr. Wansker after the administrative law judge had issued her decision and submitted to the Appeals Council in which Dr. Wansker states that the plaintiff "would be restricted to prolonged positioning including standing for more than 20 to 30 minutes a day. At this time if he stands for more than 15 to 20 minutes at a time he has significant increased back pain." *Id*. p. 484. The commissioner contends that the standing necessary to perform the job of flagger is not inconsistent with a need to stretch every hour, or even every 20 minutes, and that it was the plaintiff's burden to show that the "stretch" to which Dr. Wansker referred speaks to something else. The parties have not cited any authority on this rather narrow point and my own research has located none.

Assuming *arguendo* that the commissioner's position is correct, the fact that the administrative judge does not refer at all to Dr. Wansker's conclusions concerning limitations on the plaintiff's ability to stand or to avoid "high responsibility" is still troublesome. With respect to the limited ability to stand, she does find that

> [w]hile there is evidence of a mild spinal stenosis [and] degenerative disc disease . . ., there is no evidence of disc herniation or nerve root impingement. Clinical examinations by the treating doctor, Dr. Wansker, and the examining doctors consistently reveal no neurological deficits, negative straight leg raising and no significant loss of range of motion of the lumbar spine.

Record p. 21. She noted that the impartial medical expert who testified at the hearing stated that the record "fail[s] to demonstrate serious or neurological disease. He does have mild spinal stenosis." *Id*. p. 22. She also noted that the medical evidence "shows the existence of mild spinal stenosis without encroachment on the spinal cord, degenerative disc disease [and] chronic back pain." *Id*. p. 19. While these findings may possibly be construed to support a conclusion that Dr. Wansker's limitation on standing to periods of one hour followed by a stretch is not well-supported by clinical signs and laboratory findings or is inconsistent with other substantial medical evidence in the record, that is not the only conclusion to be drawn from them. Indeed, the administrative law judge appears to be addressing only the issues of the existence of a severe impairment at Step 2 and evaluation of the plaintiff's credibility when she makes these findings. With respect to the responsibility limitation, the opinion is devoid of any findings that could be interpreted to challenge the basis for Dr. Wansker's limitation of the plaintiff to jobs without "high responsibility."

Assuming in addition that the commissioner's position concerning the standing limitation set forth by Dr. Wansker should prevail, the responsibility limitation remains for consideration. The commissioner at oral argument characterized the vocational expert's testimony on this question as "muddled," because he first responded to the hypothetical question that included a limitation to jobs "with no more than a minimal amount of responsibilities," Record p. 71, with testimony that the plaintiff could perform the flagger job, and yet when subsequently asked on cross-examination

whether a restriction against jobs that involve high responsibility would change his opinion he answered "Yes," *id*. at 75. The commissioner argues that this testimony is not necessarily inconsistent with the flagger job.

Existing case law is helpful on this point. When a vocational expert gives testimony that is inherently inconsistent, the administrative law judge must clarify the inconsistency or give reasons for accepting one of the inconsistent assertions and not the other. *Swenson v. Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989). When the administrative law judge does neither, the vocational expert's testimony must be discounted. *Id. See also Wheat v. Heckler*, 763 F.2d 1025, 1030 (8th Cir. 1985) (unreasonable for commissioner to rely on self-contradictory statement of vocational expert, under the circumstances). Here, the administrative law judge did not undertake either of the alternatives set forth in *Swenson*. Her decision ignores the testimony elicited from the vocational expert on cross-examination.

Without the vocational expert's testimony in this case, the commissioner has failed to carry his burden of proof. Because the failure affects only Step 5 of the evaluation process, the court must determine whether remand for further proceedings or remand for payment of benefits, as requested by the plaintiff, is the appropriate remedy.

In *Field v. Chater*, 920 F.Supp. 240 (D. Me. 1995), I concluded that where there is insufficient evidence on an issue for which the Commissioner carries the burden, remand with a direction to award benefits is appropriate. *Id.* at 243. Here, the administrative law judge failed to clarify the inconsistency in the testimony of the vocational expert concerning the responsibility limitation established by the plaintiff's treating physician, and the administrative law judge gives no explanation for rejecting the vocational expert's testimony on cross-examination. The plaintiff's

counsel elicited the response that no jobs would be available for the plaintiff if that limitation were added to the hypothetical question. Under these circumstances, remand for payment is appropriate. *Id*. at 244-45. Accordingly, I recommend that the cause be remanded with directions to pay benefits.

This result makes it unnecessary to consider the remaining arguments raised by the plaintiff.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the cause **REMANDED** with directions to award benefits to the plaintiff.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of December, 1998.

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David M. Cohen
United States Magistrate Judge